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Supreme Court of the United States

OCTOBER TERM, 1936.

No. 440.

THE AMERICAN LIFE INSURANCE COMPANY,
Petitioner,

vs.

REESE SMITH STEWART, JUNIOR, AND ORA INEZ STEWART, as Executrix of the Estate of REESE SMITH STEWART, Deceased, *Respondents.*

No. 441.

THE AMERICAN LIFE INSURANCE COMPANY,
Petitioner,

vs.

ORA INEZ STEWART AND ORA INEZ STEWART, as Executrix of the Estate of REESE SMITH STEWART, Deceased, *Respondents.*

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

BRIEF OF RESPONDENTS.

STATEMENT.

The two life insurance policies here involved, each in the amount of $5000.00, were issued on or about February 23, 1932 (R. 37), and were delivered to Reese Smith Stewart, the insured, on or about February 28,

1932 (R. 37), the premiums having been paid (R. 7). The respondent Reese Smith Stewart, Jr., the insured's son, was named beneficiary in one policy. The respondent Ora Inez Stewart, the insured's wife, was named beneficiary in the other. Thereafter, and on April 13, 1932, the insured became ill, and on May 31, 1932, the insured died (R. 41).

The policies contained incontestability clauses which, by their terms, would not expire until February 23, 1934 (R. 12).

The insurance company, petitioner, filed these equity suits to cancel the policies on September 3, 1932 (R. 33). The beneficiaries, respondents, filed motions to dismiss on September 26, 1932, (R. 14). These motions were not considered until after March 16, 1933, when they were submitted to the Court (R. 18).

However, on October 27, 1932, between the time of the filing of the motions to dismiss and the time of their submission to the Court for consideration, the Company filed in each of these equity suits, its motions for leave to file supplemental bills of complaint (R. 15). These motions recited: (1) the filing of these equity actions, (2) the filing of the motions to dismiss by the respondents for the reason (among others) that the Company had an adequate remedy at law and that these motions were still pending, and (3) the following:

> "3. That since the filing of said bill of complaint in this suit and after each and all of the defendants herein had been duly served with subpoenas herein, and on the 11th day of October, 1932, said Reese Smith Stewart, Junior, filed in this court, by Ora Inez Stewart, his guardian, an action at law which is now pending before this court, being entitled Reese Smith Stewart, Jr.,

a minor, by Ora Inez Stewart, Guardian, Plaintiff, v. The American Life Insurance Company, a corporation, Defendant, and numbered 1398, wherein he seeks to recover the face value of said policy number 33954 in the amount of $5,000.00 together with interest thereon." (R. 15-16.)

The supplemental bills recited the filing of the law actions by the respondents and prayed that the respondents be enjoined and restrained from further prosecuting the legal actions until these equity causes had been determined and final decrees entered (R. 16-17). The supplemental bills were filed on October 27, 1932, and Orders of Court granting leave to file them were filed October 29, 1932 (R. 17).

Thereafter, and also prior to the submission of the motions to dismiss to the Court, the respondents were served with notices of application by the Insurance Company for the restraining order to be taken up before the District Court on March 13, 1933. These notices were filed and served on March 3, 1933 (R. 18).

The motions of the respondents to dismiss, and the applications of the Company for an order enjoining and restraining prosecution of the law actions by the respondents came on for hearing together on March 16, 1933 (R. 18). The applications for injunctive relief being contained in the supplemental bills only and the two matters coming on for hearing together make it obvious that the motions to dismiss, although directed at the original bills, were considered as though they were also directed at the supplemental bills of complaint.

The motions to dismiss were taken under advisement by the Court and the consideration of the matter of injunctive relief "prayed by petitioner in the original and supplemental bill" was deferred "until the court shall

have ruled on the motion of defendants to dismiss for want of equity, and if same be overruled prompt hearing be had thereon." (Quoted from the Order submitting motions to dismiss. R. 18).

On July 28, 1933, the Court overruled the motions to dismiss (R. 20).

Thereupon, and faced with the previous ruling of the Court, above-quoted in part, ordering a prompt hearing upon the application for injunctive relief (R. 18), the counsel for the respondents on August 29, 1933 entered into stipulations with counsel for the Company, subject, however, to the approval of the Court to try the suits in equity to the Court before the law actions were tried (R. 21). The Court entered orders upon the stipulations as follows:

> "It Is Therefore by the Court Ordered, That said suit in equity shall be tried to the court before said law action in said stipulation mentioned, Provided, However, that the issues in said law action shall be made up in order that said law issues thus joined shall stand ready for trial and said law issues, if any remain for trial, shall be tried as soon after the trial of the suit in equity as the Court shall determine.
>
> "It is further Ordered that a copy of said stipulation and a copy of this order shall be filed and entered in said law action." (R. 22)

The stipulations referred to (R. 21) as well as the orders upon the stipulations (R. 22) show that the Company had submitted itself to the jurisdiction of the law Court in the law actions. In the stipulations, after reciting the filing of these equity actions and the overruling of the motions to dismiss, it is said:

> "Whereas on October 11, 1932, said defendants (beneficiaries) filed an action at law in this court

for the recovery of the proceeds of said policy of life insurance, said action being Number 1398 and styled 'Reese Smith Stewart, Junior, a minor, et al, Plaintiff, vs. The American Life Insurance Company, a corporation, Defendant,' in which said insurance company in due time filed a motion to stay proceedings therein until the suit in equity was finally determined, said insurance company having in the meantime filed its Supplemental bill of complaint setting up the filing of said law action and thereafter made application for an order restraining and enjoining all further proceedings in said law action pending the final determination of the suit in equity, and which motion and application are still pending and undetermined." (R. 21)

The records in the District Court disclose that, in conformity to the Orders entered upon the aforementioned stipulations (R. 22) the Company on September 16, 1933, filed its answers in the law actions brought by these respondents upon the policies here involved, alleging the fraudulent procurement of the policies; replies were filed by these respondents on October 10, 1933, and thereupon the law actions stood at issue almost four months prior to the trial of these causes in equity, and well within the two-year contestable period provided for in the policies (R. 6) which did not expire until February 23, 1934 (R. 12).

The company, by these answers, having thus instituted a contest of the policies in actions at law within the time limited by the incontestable clauses, had an adequate remedy at law and was not entitled to equitable relief.

These equity causes were consolidated for the purpose of trial by Court order on October 5, 1933 (R. 25), and did not come on for trial until January 3, 1934 (R. 27).

SUMMARY OF ARGUMENT.

I.

THE BILLS FAILED TO STATE GOOD CAUSES OF ACTION IN EQUITY.

The death of the insured having occurred, the claims of the beneficiaries were pure legal claims and the defenses thereto were legal defenses. The beneficiaries, respondents herein, had the right to a trial by jury. The equity jurisdiction, if any, was to prevent the threatened loss by expiration of the contestable period of the insurance company's right to contest the policies for fraud.

The insurance company failed to allege or show any threatened loss of its right to contest the policies, merely alleging that the right of contest "may" be lost. The bills, therefore, do not present any concrete question and do not set forth a justiciable controversy.

II.

PETITIONER, HAVING A PLAIN, ADEQUATE AND COMPLETE REMEDY AT LAW, WAS NOT ENTITLED TO STAY IN EQUITY.

At the time respondents' motions to dismiss, for adequacy of the insurance company's legal remedy, were considered and passed upon, there were pending in the same court actions in equity brought to cancel life insurance policies by the insurance company and actions at law brought to recover on the same policies by the respondents. Unless the law actions should be tried first, the right to trial by jury guaranteed by the Constitution and statutes of the United States is left to the discretion of the trial judge, thus abrogating the right.

a. The Petitioner Had a Plain, Adequate and Complete Remedy at Law.

At the time the motions of the respondents to dismiss these equity suits were considered by the trial court, the insurance company had a plain, adequate and complete remedy at law in the law actions brought in the same court by the respondents to recover on the policies in which actions the insurance company had filed motions to stay proceedings.

The pleadings of the insurance company showed on their face that it had a plain, adequate and complete remedy at law, and that it had submitted to the jurisdiction of the court in the law actions prior to the time that the motions to dismiss the equity suits were considered by the trial court.

The records of the trial court show that the law actions brought by the respondents were at issue, and that the insurance company had interposed its defense of the fraudulent procurement of the policies therein, almost three months before the trial of these equity suits, and over four months before the expiration of the contestable period.

b. Respondents Did Not Waive the Right to Trial by Jury.

The alleged waiver had to do with the order of trial, and only by remote inference could it be construed to apply as a consent to jurisdiction and to a waiver of the right to trial by jury. The respondents had previously asserted their objections to the equity court's jurisdiction, in the regular and orderly manner, and these objections should not be overcome by mere inference.

It was apparent to the trial court from the pleadings and proceedings in the same court that a legal action was

pending which gave an adequate remedy to the complainants, and it is the duty of the court of equity, when it is obvious and apparent that a legal action provides an adequate remedy, that an equitable action should not be entertained.

III.

THE MERITS OF THESE CONTROVERSIES ARE NOT BEFORE THIS COURT.

The general merits of the controversy are not before this Court. The petition for certiorari was founded upon a procedural question and presumably was granted on that ground. The Court of Appeals in sustaining the motions to dismiss did not consider or pass upon the other assignments of error which related to the merits of the controversy, and no assignments of error, other than those which related to the procedural question, have been made by the petitioner in this Court.

ARGUMENT.

I.

THE BILLS FAILED TO STATE GOOD CAUSES OF ACTION IN EQUITY.

The substantial controversy between the parties to this action is whether or not the policies sued upon were obtained through fraudulent misrepresentation.

The death of the insured having occurred, the claims of the beneficiaries were pure legal claims, and the defenses to those claims were legal defenses.[1] The beneficiaries were by the constitution[2] and by law[3] guaranteed a right to trial by jury. The equitable grounds sought to be interposed were those to prevent an injustice which might occur if the beneficiaries did not institute a contest within the contestable period fixed by the policies.

The complainant had no right to have the alleged fraudulent misrepresentations determined by a Court of equity. The right of the Court of equity to intercede was entirely dependent upon the possible or threatened loss of complainant's defense, if a controversy was not instituted within the contestable period. Necessarily, the right of a Court of equity to intercede was dependent entirely upon the probability of losing that right.[4]

In the instance in question, the policies contained limitations of contestability of two years from the date of issue. (R. 12.) The policies were issued as of the date of the 23rd day of February, 1932. The contestable

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1 Enelow v. New York Life Ins. Co., 293 U. S. 379; Adamos v. New York Life Ins. Co., 293 U. S. 386.

2 Seventh Amendment to the Constitution of the United States.

3 Section 16 of the Judiciary Act, Act of September 24, 1789, Sec. 16, 1 Stat. at L. 82, chap. 20, Judicial Code, Sec. 267, U. S. C. Title 28, Sec. 384.

4 See Mutual Life Ins. Co. v. Hurni Packing Co., 263 U. S. 167, and cases cited in Enelow v. New York Life Ins. Co., 293 U. S. 379, 384.

period would expire on February 23rd, 1934. These actions were brought on September 3rd, 1932, seventeen months and twenty days before the right to contest would expire.

It also appears that the insured had died on May 31st, 1932 (R. 41), leaving only three months and three days within which the beneficiaries had not proceeded at law to collect the policies. This delay, considering the time necessary to furnish proof of death and reasonable opportunity to pay the claim without litigation, cannot be unreasonable unless litigation is to be encouraged.

It is pertinent to note that in the bill filed the complainant makes no allegations of threatened loss or even reasonable probability of loss, but alleges in these words:

> " * * * that the defendant herein, the beneficiary under said policy, may delay the commencement of an action at law for the enforcement and collection of said policy until after the expiration of said contestable period or, if action is instituted, may dismiss the same after the expiration of said two-year period, so as to prevent this complainant from defending its liability under the policy on the ground of misrepresentation and fraud, as has been above set out, and this complainant is without adequate remedy at law in the premises and the only protection it has against the effects of said misrepresentation and fraud is in a court of equity." (R. 6.)

Under the above allegations, which are the sole allegations made to give jurisdiction to a Court of equity we have merely an abstract question; at most, a mere apprehension or fear of a remote injury. No allegations are made or facts stated to justify even an inference that the beneficiaries would not commence actions within the contestable period.

There is in fact no reasonable deduction to be made from the conduct of the parties other than that the complainant desired to try these cases in a court of equity, and thereby deprive the beneficiaries of the right to a trial by jury as guaranteed to them by the constitution.

This case is of that type of equity jurisdiction which is to prevent injury as distinguished from the types which determine controversies and adjudicate rights dependent upon facts which have occurred. They are similar to suits for injunctions to prevent continuance of injuries or of anticipated injuries. It is a fixed principal of law in the latter type of actions that the continuance of the injury or the occurring of the injury must be probable and imminent as distinguished from being possible or a mere matter of fear or apprehension or merely an abstract question. The bills, there, do not present any concrete question and therefore do not set forth any justiciable controversy.

Connecticut v. Massachusetts, 282 U. S. 660.
New York v. Illinois, 274 U. S. 488.
New Jersey v. Sargent, 269 U. S. 328.
Texas v. Interstate Commerce Commission, 258 U. S. 158.
Marye v. Parsons, 114 U. S. 325.
Foster v. Mansfield C. & L. M. R. Co., 146 U. S. 88.
Stearns v. Wood, 236 U. S. 75.

II.

PETITIONER, HAVING A PLAIN, ADEQUATE, AND COMPLETE REMEDY AT LAW, WAS NOT ENTITLED TO STAY IN EQUITY.

Arising out of this controversy and at the time that the motions to dismiss were passed upon, there were pending

in the same Court actions brought by the Insurance Company in equity and actions brought by the beneficiaries at law.

It is a certainty that the pendency of the equitable actions did not preclude the bringing of the actions at law, and if the equitable actions are not suspended or subject to dismissal on account of the pendency of the legal actions, then we would have pending in the same Court a legal action and an equitable action in which the entire controversy could be fully and finally determined. The only substantial differences between the two actions being that the equitable actions would be tried by the Court and the legal action would be tried by a jury.

The necessities of that situation or the requirements of the law would not require either action to be tried first, that is, if complainant's contentions are sound. We would therefore have the situation of a litigant's right to a trial by jury being dependent upon the discretion, the convenience of the Court or other circumstances and reasons by which the trial Court would determine in each instance which case would be tried first, and as in either case the entire controversy could be adjudicated nothing could remain for trial or determination in the other case.

Aside from all other considerations such a result would be disparaging to the dignity of the Courts. It would create an uncertainty as to the right of a trial by jury which could be dependent entirely upon the discretion or even the caprice of the judges of the different districts in which such causes of action might be pending.

To argue that an equitable action being brought first has a preference in priority of trial or that the preference of trial is a matter of discretion of the trial Court

is entirely to ignore the provisions of the Constitution with respect to jury trials and the statutory provisions now existing with respect to the right of trial by jury. It is also to ignore the spirit and evident purpose of recent legislative acts which require equitable defenses to be tried in law actions by a jury.[5]

As a clear and comprehensive statement of our contention, we quote from the opinion of District Judge Riner in the case of *Smith v. American National Bank*, C. C. A. 8, 89 Fed. 832, at page 838:

> " * * * Section 723 of the Revised Statutes provides that 'suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law.' This section, it will be noticed, creates a limitation and exception to the jurisdiction of the court by declaring that the case defined in the section is not a suit in equity cognizable under the power conferred by section 629. Congress undoubtedly had the power to define what should be a case in equity by declaring what the common law was which drew the line between the courts of law and equity, and there can be doubt that, when so declared, that declaration was obligatory upon the federal courts by superadding the authority of the legislative department of the government to that of the common law, so as not to leave the line of separation discretionary with the judges. The seventh amendment to the constitution provides: 'In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury shall be otherwise re-examined in any court of the United States than according to the rules of common law.' The effect of this provision is to declare that the right of trial by jury shall depend neither on leg-

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5 §274b of the Judicial Code, Mar. 3, 1915, C. 90, 38 Stat. 956; U. S. C. A. Title 28, Sec. 398.

islative nor judicial discretion. In the absence of this provision, this right might be impaired (1) by the organization of courts in such manner as not to secure it to suitors; (2) by authorizing courts to exercise, or by their assumption of, equity or admiralty jurisdiction over cases at law. This provision of the constitution, however, preserves the right of jury trial against any infringement by any department of the government, and section 723 prohibits all courts of the United States from sustaining suits in equity where the remedy is complete at law. Taking this section in connection with section 648 of the Revised Statutes, which provides that 'a trial on issues of fact in the circuit court shall be by jury except in cases of equity and of admiralty jurisdiction, and except as otherwise provided * * * by the next section' (which provides for a waiver of a jury by the parties), it is perfectly clear that congress, by this legislation, intended to preserve to all litigants a right deemed both valuable and sacred. It will be noticed from an examination of this legislation that to bring a case within the exception mentioned in section 723 of the Revised Statutes, two things must concur: (1) It must be a suit of equity jurisdiction; (2) a suit in which a complete remedy cannot be had at law. If any such remedy could be had at law, then it is a suit at common law within the provisions of the seventh amendment to the constitution."

See also, *Griesa v. Mutual Life Ins. Co.*, 169 Fed. 509 (C.C.A. 8) certiorari denied 215 U. S. 600.

Therefore, as heretofore stated, if both types of actions could be pending at the same time, if either one could be tried first, if either one could finally and completely determine the entire controversy, and if the order of trial was a matter of discretion of the trial Court, then the substantial right of trial by jury would neces-

sarily be merely a matter of discretion and not a right guaranteed by the Constitution.

(a) The Petitioner Had a Plain, Adequate, and Complete Remedy at Law.

On September 3, 1932, the day these equity suits were filed, there remained seventeen months and twenty days before the expiration of the contestable period (R. 12). The beneficiaries, respondents here, filed motions to dismiss. Less than six weeks after these suits were filed respondents filed legal actions in the same court to recover on the policies (R. 15).

Thereafter on October 27, 1932, the insurance company filed motions for leave to file supplemental bills in these suits. The motions recited (1) the filing of these equity suits, (2) the filing of motions to dismiss by respondents for the reason, among others, that the company had an adequate remedy at law and that these motions to dismiss were still pending and undetermined, and (3) that the respondents had, on October 11, 1932, filed law actions on the policies in the same court (R. 15). In the supplemental bills the company sought to enjoin the prosecution of the law actions by the respondents until these equity suits had been determined (R. 16).

The insurance company in due time filed in the law actions brought by the respondents, motions to stay proceedings in the law actions until these equity suits were finally determined (R. 21).

On March 3, 1933, at which time the motions to dismiss were still pending and undetermined, the insurance company notified respondents that it intended to present to the Court its application to enjoin prosecution of respondents' legal actions (R. 18).

Thereupon, on March 16, 1933, the motions to dismiss and the application of the insurance company to enjoin prosecution of the law actions came on for hearing before the trial Court (R. 18).

At this time, the insurance company had submitted to the jurisdiction of the Court in the law actions by filing therein motions to stay proceedings. Moreover, the following well-considered cases hold that the legal remedy of the insurance company became plain, adequate and complete notwithstanding the pendency of the equity suits, upon the filing of the law actions within the contestable period by the respondents.

Great Southern Life Ins. Co. v. Burwell, (C.C.A. 5), 12 Fed. (2d) 244, and Certiorari denied 271 U. S. 683.

New York Life Ins. Co. v. McCarthy, (C.C.A. 5), 22 Fed. (2d) 241.

New York Life Ins Co. v. Thompson, (C.C.A. 10), 78 Fed. (2d) 946.

Rohrbach v. Mutual Life Ins. Co., (C.C.A. 8), 82 Fed. (2d) 291.

And see:

Griesa v. Mutual Life Ins. Co., (C.C.A. 8), 169 Fed. 509, Certiorari denied, 215 U. S. 600.

Enelow v. New York Life Ins. Co., 293 U. S. 379.

Adamos v. New York Life Ins. Co., 293 U. S. 386.

The motions to dismiss were considered as leveled at both the original and at the supplemental bills herein, since the application for injunction against the prosecution of the law actions which came on for hearing at the same time is found only in the supplemental bills. The supplemental bills also recite that the law actions have been filed by the respondents (R. 16). Therefore,

the pleadings of the petitioner show upon their face that petitioner had a plain, adequate and complete remedy at law within the contestable period, at the time the motions to dismiss were considered. Under such circumstances it is held that the actions to cancel the policies for fraud will not be entertained in a court of equity.

Cable v. United States Life Ins. Co., 191 U. S. 288.
Phoenix Mutual Life Ins. Co. v. Bailey, 13 Wall. 616.
Di Giovanni v. Camden Fire Ins. Co., 296 U. S. 64.
Nichols v. Pacific Mutual Life Ins. Co., (C.C.A. 8, 1936), 84 F. (2d) 896.
Griesa v. Mutual Life Ins. Co., (C.C.A. 8) 169 Fed. 509, Certiorari denied 215 U. S. 600.
Riggs v. Union Life Ins. Co. (C.C. A. 8), 129 Fed. 207.
Rohrbach v. Mutual Life Ins. Co. (C.C.A. 8, 1936), 82 F. (2d) 291.
New York Life Ins. Co. v. Thompson (C.C.A. 10, 1935), 78 F. (2d) 946.

In addition to what is shown by the record in this case, the District Court had the right to take judicial notice of its own records.

Great Southern Life Ins. Co. v. Burwell, 12 Fed. (2d) 244, (C.C.A. 5) and Certiorari denied 271 U. S. 683.
Freshman v. Atkins, 269 U. S. 121, 124, and cases cited.
Bienville Water Supply Co. v. Mobile, 186 U. S. 212, 217.
Dimmick v. Tomkins, 194 U. S. 540, 548.
National Fire Ins. Co. v. Thompson, 281 U. S. 331, 336.
Franz v. Buder, 34 Fed. (2d) 353, 356, (C.C.A. 8).

The records in the District Court disclose that the insurance company on September 16, 1933, filed its answers in the law actions brought by these respondents alleging the fraudulent procurement of the policies, thus instituting a contest of the policies for fraud in actions at law. The records also show that respondents replied to these answers on October 10, 1933, whereupon the actions at law upon the policies were *at issue* two months and twenty-three days before the trial of these equity suits in the same court, and four months and thirteen days before the expiration of the contestable period.

The insurance company had thus instituted a contest of the policies in actions at law. A dismissal of the law actions thereafter would not deprive the company of the benefit of that contest.

Cable v. United States Life Ins. Co., 191 U. S. 288, 309.

New York Life Ins. Co. v. Miller, (C.C.A. 8) 73 Fed. (2d) 350.

New York Life Ins. Co. v. Hurt, (C.C.A. 8) 35 Fed. (2d) 92, 96.

Thomas v. Life Ins. Co., 135 Kan. 381, 10 Pac. (2d) 864.

Moreover, the insurance company after the pendency of the law action could plead as a counterclaim or cross-petition the very same cause of action which is set out in the Bill of Complaint to cancel the policy for fraud. By the Kansas Code of Procedure, the dismissal of an action by the plaintiff does not dismiss any counterclaim plead by the defendant. The Revised Statutes of Kansas, 1923, Section 60-3106 provide:

"In any case where a set-off or counterclaim has been presented, the defendant shall have the right

of proceeding to the trial of his claim, although the plaintiff may have dismissed his action or failed to appear."

See *Northern Life Ins. Co. v. Walker,* 123 Wash. 203, 212 Pac. 277.

(b) Respondents Did Not Waive the Right to Trial by Jury.

The stipulations relating to the order of trial referred to did not purport to waive the respondents' objections contained in the motions to dismiss on account of complainant having an adequate remedy at law.

They purported at most to relate to the order of trial in view of the state of the record in the equity suits and in the law actions, and necessarily, in view of the court having overruled the motions to dismiss, had to do with the convenience or other considerations which might affect the parties in determining which action should be tried first. The fact with regard to whether or not a Court of equity had jurisdiction was then not dependent upon controverted questions of fact. These facts were then of record in the original and supplemental bill which showed that legal actions which gave to the complainants an adequate remedy at law were then pending.

The jurisdiction of a Court of equity upon the grounds that the complainant is without an adequate remedy at law is not a jurisdiction which the parties can by consent or waiver give to a Court of equity.

The *Judicial Code, U. S. C. A.* Title 28, Section 384, provides:

"(JUDICIAL CODE, Section 267.) Suits in equity when not sustainable. Suits in equity shall not be

sustained in any court of the United States in any case where a plain, adequate, and complete remedy may be had at law. (R. S. 723; Mar. 3, 1911, c. 231, 267, 36 Stat. 1163.)

This section has to do with the jurisdiction of the Court and it is evident from it, as well as from the decisions of the Courts, that jurisdiction of an equity court cannot be given by a mere consent and waiver.

Whenever at any stage of the proceedings it appears to a Federal Court in equity that there is a plain, complete and adequate remedy at law, the Court has the duty to dismiss the suit and leave the parties to their legal remedy, even though the point is not raised by the pleadings nor suggested by counsel.

Hipp v. Babin, 19 How. 279.
Oelrichs v. Williams, 15 Wall (82 U. S.) 211.
Lewis v. Cocks, 23 Wall. (90 U. S.) 466.
Boise Artesian H. & C. Water Co. v. Boise City, 213 U. S. 276.
Phoenix Life Ins. Co. v. Bailey, 13 Wall (80 U. S.) 616.
Sewing Machine Co. v. Benedict, 229 U. S. 481.

The waiver here asserted does not have to do with the appearance or personal privilege of the litigants. It has to do with the giving of jurisdiction to a Court, which it otherwise would not have.

The substantial controversy in its procedural aspect is whether or not the respondents were entitled to a trial by jury, and as the right to a trial by jury is a valuable right, every reasonable assumption should be indulged in against its waiver.

Hodges v. Easton, 106 U. S. 408.
Baylis v. Travelers Ins. Co., 113 U. S. 316.

III.

THE MERITS OF THESE CONTROVERSIES ARE NOT BEFORE THIS COURT.

Petitioner apparently contends in Point D of its brief that this Court should overlook all that took place in the Circuit Court of Appeals and affirm the trial court on the merits. However, in the portion of the finding of fact of the trial court which petitioner has quoted on page 18 of its brief, it has failed to show respondents' objection and exception which were allowed thereto (R. 44) and has failed to show that the Circuit Court of Appeals determined this controversy on procedural and jurisdictional grounds only, and failed to consider the merits of this controversy. *Burnet v. Commonwealth Improv. Co.*, 287 U. S. 413.

That the Circuit Court of Appeals did not determine the merits is not assigned as error in the petition for the writ of certiorari. *Prudence Co. v. Fidelity & Deposit Co.*, 297 U. S. 198.

Furthermore, certiorari was granted upon a petition which was founded solely upon the procedural and jurisdictional controversy here presented, i. e. whether the insurance company has an adequate remedy at law, this is therefore the only question which will be considered by this Court.

Helvering v. Taylor, 293 U. S. 507.
Lloyd v. Elling 297 U. S. 329.
Liberty Oil Co. v. Condon Nat'l Bank, 260 U. S. 235.
Paragraph 2(e) and Paragraph 4 of Rule 27 (formerly Rule 25), of the *Rules of the Supreme Court of the United States.*

CONCLUSION.

The practical and general question of interest which necessarily arises out of this controversy is whether or not these types of controversies are to be made a mere race to the courthouse. In such a race, in view of the common restrictions which require a reasonable time after presentation of proof of death before actions can be filed, and in view of the reasonable desire that beneficiaries may have to avoid the employing of attorneys until a reasonable opportunity is given to the Insurance Companies to pay their claims, it must be apparent that a substantial handicap would be imposed upon the beneficiaries in the assertion of their rights.

Respectfully submitted,

CHAS. G. YANKEY,
Attorney for Respondents.
WILLIAM KEITH,
VERNE M. LAING,
Of Counsel,
Wichita, Kansas.